

5 ADAPTIX, INC.,)
6 Plaintiff,)
7 vs.) No. C 14-01385-PSG
8 SONY MOBILE COMMUNICATIONS,) Related Case Nos.:
INC., et al.,) C 14-01379-PSG
9) C 14-01259-PSG
10 Defendant.) C 14-02359-PSG
11) C 14-02360-PSG
12) C 14-02895-PSG
13) C 15-00364-PSG
14) C 15-00367-PSG
15) C 15-00366-PSG
16) C 15-00367-PSG
17) C 15-00962-PSG
18) C 15-00971-PSG
19) C 15-00972-PSG

San Jose, California
Monday, November 23, 2015

17 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING 4:29 - 5:25 = 54 MINUTES

18 APPENDICES

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1 Monday, November 23, 2015

4:29 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oo--

4 THE CLERK: Calling Adaptix, Inc. versus Dell,
5 Inc. et al, Case Number CV14-1259-PSG and related cases.

6 Counsel, please state your appearances.

7 THE COURT: Good afternoon everyone or good
8 evening, I should say.

9 Mr. Foster, would you like to begin?

10 MR. FOSTER: James Foster for Adaptix, your Honor.

11 MR. SELWYN: Good afternoon, your Honor. Mark
12 Selwyn for Apple.

13 MR. PANKRATZ: Good afternoon. Kurt Pankratz on
14 behalf of AT and T.

15 MR. WILLIAMS: Your Honor, Fred Williams for HTC
16 and AT and T.

17 MR. MAHON: Your Honor, James Mahon for Sony
18 Mobile.

19 MR. GODFREY: Good afternoon, your Honor. Geoff
20 Godfrey for Verizon Wireless.

21 MR. CRUZEN: Good afternoon, your Honor. Bob
22 Cruzen for Amazon.com.

23 THE COURT: Good afternoon to each of you. I
24 understand we have at least one attorney appearing by
25 telephone on Court Call, is that right?

1 MR. CLONTS (telephonic): Yes, your Honor. This
2 is David Clonts for AT and T.

3 THE COURT: Good afternoon. Welcome. Please have
4 a seat, everyone.

5 MR. CLONTS: Good afternoon.

6 MR. FOSTER: Your Honor, I have an announcement.

7 THE COURT: Yes, Mr. Foster.

8 MR. FOSTER: I'd like to thank Judge Cousins, but
9 it appears that Sony and Adaptix have worked out a
10 settlement. So the Sony motions will be off calendar today
11 if that's all right with your Honor. And if your Honor will
12 excuse Mr. Mahon. He has to go to Judge Cousins to work out
13 the language before everybody leaves.

14 MR. MAHON: Yes, your Honor, that's correct. We
15 have reached a settlement in principle, and we are working
16 on the terms sheet now to get that done today with Judge
17 Cousins.

18 THE COURT: Terrific. Well, let me also express
19 my appreciation to Judge Cousins for his work today. Let me
20 also observe that perhaps I ought to go longer in other
21 cases more often. I appreciate your efforts to make this
22 time productive, and I do appreciate your efforts in
23 resolving the case. If you need any help from me, let me
24 know. Otherwise, you're certainly excused to go do whatever
25 you need to do with Judge Cousins.

1 MR. MAHON: Okay. So I assume our two motions are
2 now off the calendar for today.

3 THE COURT: Your assumption is correct. They are
4 off calendar.

5 MR. MAHON: Thank you very much, your Honor.

6 THE COURT: Thank you. All right.

7 Let's turn to the matters that remain. And, as I
8 understand it from a letter that I received, I think it was
9 on November 16th, the parties have worked out a proposed
10 order.

11 Let me just say this before we turn to the motions that
12 remain. As far as I'm concerned, you all have been very
13 patient with me, and so I'm happy and eager to give you
14 whatever time you need today and tonight to hear these
15 motions properly. At the same time, I recognize it's been a
16 long afternoon for you all and you've been sitting around,
17 hopefully making some productive use of the time. So I give
18 you two options. If you can all agree on it, great. If
19 not, we'll just do what I think is best.

20 One is to plow through these motions now and stay as
21 late as we need to to get them resolved. The other is if
22 you have some pressing commitments this evening, I'm happy
23 to have you back tomorrow and hear this either live or by
24 telephone. I'd just as soon get this done and get done
25 tonight. Do you all agree? All right. Terrific.

1 UNIDENTIFIED SPEAKER: I'm traveling. I'm --

2 THE COURT: Then let's stick with what we've got
3 and do the best that we can.

4 If I'm right, Sony's motion was set to be heard last.
5 So why don't we turn to Adaptix's Rule 52 and 59 motion to
6 alter judgment. Mr. Foster, go ahead, sir.

7 MR. FOSTER: One other announcement before we do
8 that, your Honor. Sony and Kyocera have reached an
9 agreement in principle. Kyocera should have been filing
10 today, but it hasn't come across the -- my E-mail yet -- ECF
11 filing a request for a stay of the action to give the
12 parties until December 18th to finalize the settlement.
13 Just so you know.

14 THE COURT: Thank you for letting me know.

15 MR. FOSTER: Now I have some slides.

16 THE COURT: All right.

17 MR. FOSTER: Give this to Mr. Rivera?

18 THE COURT: If you would please. Thank you.

19 MR. FOSTER: I've cut down on the number of
20 slides, your Honor, because I've covered most of this area
21 at some point. So I understand the first motion to be
22 argued and there are issues that some of the issues go
23 across a number of different motions. So I'm just going to
24 argue an issue once, and if it --

25 THE COURT: I appreciate that.

1 MR. FOSTER: Unless you want me to do it later.
2 The first issue and the one which is the only issue in the
3 first case is what I call the Dow issue. This is the issue
4 of whether there's a temporal limitation on claim
5 preclusion. And, again, I'm going to not race through it
6 but not dwell on any of these points, particularly the ones
7 I've covered before.

8 THE COURT: I take it, Mr. Foster, you think Dow
9 does change things?

10 MR. FOSTER: Your Honor, yes, it does. I think it
11 -- the way I read Dow, it reinforces an argument we've made
12 before, and that is that there is a temporal limitation on
13 the claim preclusion.

14 THE COURT: Go ahead.

15 MR. FOSTER: But, again, I won't take too long
16 with this argument, but I think there are a couple of
17 important points to make. The first sheet -- and this is
18 central -- central -- and I have a hard time explaining
19 claim preclusion to the younger people in my office because
20 they tend to confuse it with issue preclusion, and what I
21 say here is that issue preclusion, if you argue it once and
22 you lose, you can't do it again. Claim preclusion is for
23 the issues that aren't argued, were left out for whatever
24 reason, and it doesn't matter whether you won or lose the
25 issues that were argued because you didn't litigate an

1 issue, you can't get into it again. The idea is to
2 encourage that the entire claim is handled in one suit.

3 And, specifically in this case -- oh, by the way, the
4 briefing on appeal was completed this past week.

5 THE COURT: I was going to ask. Thanks for
6 telling me. Okay.

7 MR. FOSTER: I think only days ago. We have done
8 some study into the Federal Circuit's calendar and
9 practices. It's reasonable to expect the case will be
10 called for argument in about three months. Again, charting
11 precedential decisions, it would be reasonable to expect a
12 decision in this appeal about the middle of this summer. Of
13 course, if it's a Rule 36 affirmation, it would make them
14 more quickly than that.

15 So the point is that whatever the Federal Circuit does
16 in this should not affect claim preclusion. Claim
17 preclusion is the issues not litigated.

18 So, on the next sheet we outlined the conflict between
19 your decision of August 21 and the language of Dow. You're
20 quite clear that -- well, you know what you said, and Dow
21 says the doctrine of claim preclusion does not apply as
22 between the claims for the first and second damages periods.
23 So you've read Dow by this time. I don't need to get into
24 that.

25 The next slide is -- is a prelude to what my major

1 argument is. As I read the briefing on this motion, I don't
2 see Defendants as really disputing that Dow's holding as to
3 claim preclusion overrules this Court's position that claim
4 preclusion has no temporal limitation. They are only
5 arguing that this Court should disregard Dow as you've
6 disregarded other decisions in the past, citing the Newal
7 (phonetic) principles.

8 I don't read the Defendants as arguing that the use of
9 the term "claim preclusion" was not a mistake by Judge Rader
10 in the Nystrom opinion, and what I did notice when I read
11 their briefing was they scrupulously avoided responding to
12 anything we said in our papers about the various Federal
13 Circuit decisions applying the Newal principles.

14 So which brings me to my concluding argument on this
15 point, and that's the next page. I think what we need to do
16 is look at what will happen at the Federal Circuit. I mean,
17 we've made our motion. You can deny it. Okay. But what
18 will happen when this case gets to the Federal Circuit,
19 well, they say there has to be an en banc hearing. Let's
20 suppose the Federal Circuit -- that's 12 people -- sit down.
21 What's going to happen to their argument? In their briefing
22 they didn't really defend what Judge Rader said or -- I
23 mean, occasion there are issues which are -- there's a huge
24 gap in the profession. There's something to be argued. I
25 gave an example the last time I was here about claims where

1 products were defined by the process of making them then.
2 To our part the Federal Circuits were a couple of years
3 before they finally resolved it.

4 This isn't that, and at an event hearing, what would
5 happen, they would have to come up with some argument to
6 defend what I'll call the Nystrom position, but they haven't
7 put any of those arguments in their briefings here. So I
8 wonder whether the Federal Circuit would even let them do
9 that. The Federal Circuit, I would suspect at the en banc
10 hearing would note that the language in Nystrom was a
11 mistake, that Aspex dealt with that, and they would cite the
12 authority -- the judges would cite the authority in Dow,
13 Aspex, and Brain Life, and I don't know what the argument
14 would be, and maybe I'll hear it today from my talented
15 opponents. But, realistically, the Federal Circuit is not
16 going to -- in my view, is not going to schedule this for an
17 en banc hearing. They'll assign it to a panel. The panel
18 will show up. They'll cite CFC cases that we cite in our
19 briefs. They'll cite the Newal business. They may even
20 pick up the fact that the earlier Foster cases actually went
21 the way we said they did. And I don't know what the counsel
22 is going to do to defend that for the panel, but that's me
23 projecting what will happen, and I think the most important
24 sheet is we have to look at what's going to happen in the
25 Federal Circuit.

1 If your Honor can deny my motion and see what happens,
2 but if -- if your Honor feels as I do that the Federal
3 Circuit -- it's a foregone conclusion what they're going to
4 do, maybe we can save them that issue, but I'll leave that
5 for the Court, and I'll turn the microphone over to my
6 adversary.

7 THE COURT: Thank you, Mr. Foster.

8 Mr. Selwyn, good evening.

9 MR. SELWYN: Good afternoon, your Honor.

10 Your Honor, we are here today on Adaptix's Rule 52 and
11 Rule 59 motion, and I emphasize that because the procedural
12 posture is quite important, and it goes to one of the
13 reasons the motion must be denied.

14 First, neither Rule 59 nor Rule 52 provides a basis for
15 the Court to alter or amend its judgments and, second, Dow
16 Chemical does not change the law in any way relevant to
17 claim preclusion.

18 Let me first address the important procedural issue
19 here. Rule 59(e) authorizes a Court to "alter or amend" a
20 judgment. In this case, the Court granted the Defendant's
21 motion to dismiss on two independent grounds. First, claim
22 preclusion and, second, the Kessler Doctrine.

23 Adaptix's motion is expressly not directed to the
24 Kessler Doctrine. Adaptix says that on page seven of its
25 opening motion. So even if the Court were to decide that

1 Dow Chemical change the law in a way material to the claim
2 preclusion issue, which it did not, the Court would still
3 have no cause to alter or amend its judgment here as they
4 would still be fully and independently supported by the
5 Kessler Doctrine.

6 THE COURT: Right. So, Mr. Selwyn, one of the
7 things the scope of my judgment and its impact or effect is
8 not dependent any way upon which of these two grounds.
9 Either way, the judgment should stand. Is that what you're
10 saying?

11 MR. SELWYN: That's exactly right. Your Honor
12 said -- addressed each of those and expressly held that each
13 was an independent basis for your Court's ruling dismissing
14 -- granting the motion to dismiss and granting judgment in
15 Defendant's favor.

16 Adaptix seems to seek for the Court to reconsider the
17 reasoning of its decision insofar as it granted the motion
18 to dismiss based on claim preclusion. But Rule 59(e) is not
19 a proper vehicle to do so here because even if the Court
20 were to find merit in Adaptix's argument regarding claim
21 preclusion, the judgments closing the case would remain
22 unaffected.

23 Adaptix also refers to Rule 52(b) in its moving papers,
24 although it does so quite fleetingly. Rule 52(b) also
25 provides no procedural basis for the Court to alter or amend

1 its judgments here. Rule 52(b) is directed to allowing the
2 Court to amend its findings of fact or make new findings of
3 fact following a bench trial. In this case, of course, the
4 Court granted judgment under Rule 12. There was no bench
5 trial. There was no -- there were no findings of fact.
6 Rule 52(b) simply has no application under these
7 circumstances, and --

8 THE COURT: Mr. Selwyn, I'm sorry for interrupting
9 you, sir. You raise an interesting procedural question.
10 Let's put Rule 52 to the side for a moment, and let's focus
11 on Rule 59. If I hear you right, as you've already
12 explained now a couple of times, because my judgment had two
13 independent bases, even if I were inclined to agree with Mr.
14 Foster as to one of those bases or grounds because the other
15 independent bases or grounds would stand, the judgment
16 should not be affected, would not be affected, and no -- no
17 relief could properly be granted, right?

18 MR. SELWYN: That's right.

19 THE COURT: If I accept that additional point, am
20 I precluded in any way from "fixing" a problem that I might
21 see if I read Dow as changing the state of the law? In
22 other words, do I have any procedural mechanisms to address
23 new case law from the Federal Circuit that might impact one
24 of two independent grounds for a judgment? Do you have any
25 thoughts about that?

1 MR. SELWYN: Well, that doesn't change a lot, but
2 if we posit for the sake of --

3 THE COURT: I appreciate that.

4 MR. SELWYN: -- argument that it -- that it would,
5 I think the answer to your question is no. In this
6 circumstance, you would not have any opportunity --

7 THE COURT: Okay.

8 MR. SELWYN: -- to do that. And we discussed that
9 at some length at pages three and four of our brief, that in
10 a case where the Court is being asked to reconsider its
11 reasoning but not the judgment, Rule 59(e) is, in fact, not
12 the right vehicle.

13 THE COURT: Right.

14 MR. SELWYN: Because there is a distinction
15 between the Court's decision on the one hand and the Court's
16 judgment on the other.

17 THE COURT: Right. Presumably, my judgments could
18 stand even if my reasoning were extremely terse. It might
19 not get me brownie points at the Federal Circuit to just
20 issue a one or two-line decision supporting -- or explaining
21 that judgment, but the alternative you point to is
22 presumably governed by our Local Rules, right? So to the
23 extent the Court wished to reconsider an opinion or decision
24 separate and apart from a judgment, there are mechanisms
25 under our Local Rules for doing so, but they're rather

1 limited, right, new case law, new facts, manifest injustice,
2 that sort of thing?

3 MR. SELWYN: That's correct. And the Ninth
4 Circuit and the Federal Circuit have made clear that Rule
5 59(e) is an extraordinary remedy, to use their terms. It's
6 not a vehicle for reconsideration by the Court of the same
7 arguments that were already heard, as this case, on the
8 underlying motion.

9 THE COURT: Right. It's not even for a -- as they
10 say, the -- a change of heart.

11 MR. SELWYN: Correct.

12 THE COURT: Okay. Go ahead.

13 MR. SELWYN: So, simply put, the Court should deny
14 Adaptix's motion because its arguments do not properly fall
15 within either of the two rules that it has invoked, but even
16 if Rule 59 or Rule 52 provided a basis for the Court to
17 reconsider one of the grounds on which its judgment was
18 based, Adaptix's motion would fare no better either. Dow
19 Chemical did not bring about any change in the law regarding
20 claim preclusion. Under Adaptix's reading of Dow Chemical,
21 the case simply followed the approach to claim preclusion
22 that the Federal Circuit had followed in Brain Life and then
23 Aspex. But just as in Brain Life and Aspex could not
24 overrule the Federal Circuit's earlier decisions in Nystrom,
25 in Foster and in Hallco, as this Court's found in its

1 decision granting the Defendants' motion to dismiss, so too
2 Dow Chemical cannot overrule those prior cases.

3 THE COURT: So that even if it were inconsistent
4 with Nystrom, your view is, as I have explained myself in my
5 opinion, that we're stuck with Nystrom right or wrong?

6 MR. SELWYN: That's exactly right. On the bottom
7 of page 14 in your Honor's decision you wrote:

8 "Unless and until the Federal
9 Circuit sits en banc to resolve any
10 inconsistency between the principals
11 elaborated in Nystrom and those of
12 Aspex, the earlier ruling trumps."

13 Your Honor could just as easily substitute Dow Chemical
14 in that sentence for Aspex, and your Honor's ruling would
15 still remain the same.

16 THE COURT: Are you aware, Mr. Selwyn, of any
17 other case that is before the Federal Circuit that might
18 offer the Federal Circuit an opportunity? I'm happy to give
19 them that chance if they choose to pursue it, but are you
20 aware of any such opportunity that might predate that?

21 MR. SELWYN: I'm not aware of one. It's not to
22 say that there isn't one, but I'm not aware of it.

23 THE COURT: I understand.

24 MR. SELWYN: So, in short, Dow Chemical does not
25 represent an intervening change of controlling law or in any

1 way alter the intra-circuit conflict on the claim preclusion
2 issue that the Court has already recognized in reaching its
3 decision granting the motion to dismiss and entering
4 judgment for the Defendants.

5 Dow Chemical at most means that the intra-circuit
6 conflict is now evenly divided. We have three decisions on
7 one hand, and we have three decisions on the other, and the
8 parties addressed this intra-circuit conflict at length in
9 the underlying briefing to the motion to dismiss. We
10 addressed it at length in -- before your Honor at the
11 hearing, and, most importantly, your Honor addressed this
12 issue precisely in its decision granting the motion to
13 dismiss. There's nothing in Dow Chemical that alters that
14 decision.

15 And then just finally to address Mr. Foster's slide
16 about what Defendants do not dispute. We do dispute these
17 things. They were discussed at length in the underlying
18 briefing. Just to take one example, the slide says
19 Defendants do not dispute Nystrom's use of the term "claim
20 preclusion" was a mistake. Well, in fact, we addressed at
21 length in our reply brief this issue, and to quote, we
22 wrote:

23 "Not only does Nystrom repeatedly
24 mention claim preclusion and res
25 judicata without any reference to issue

1 preclusion, but issue preclusion could
2 not have barred Nystrom's claim because
3 he asserted a different theory," and so
4 forth.

5 So certain things were not addressed because they were
6 addressed below. They were precisely considered by your
7 Honor. They were rejected in granting the motion to
8 dismiss.

9 THE COURT: All right.

10 MR. SELWYN: Thank you.

11 THE COURT: Thank you, Mr. Selwyn.

12 Mr. Foster, any rebuttal?

13 MR. FOSTER: Briefly, please.

14 THE COURT: Go ahead.

15 MR. FOSTER: As your Honor is aware, the same
16 issue was presented in the wave four cases.

17 THE COURT: Yes.

18 MR. FOSTER: And so it is appropriate for Rule 59
19 treatment in those cases that, frankly, since your Honor
20 asked to get into this and do whatever you're going to do
21 with it, it didn't seem to make any sense for you to reach
22 inconsistent results in one case and not the other. So we
23 put it in this case as well.

24 I agree with my colleague that it's -- Rule 59 is not
25 the right vehicle for his case, but Rule 52 is, and we have

1 a footnote saying Rule 52 is the proper procedural issue.
2 But if you come out the same way, it doesn't really matter.
3 But if you come out our way in the wave four cases, it looks
4 kind of dopey if you're saying two different things.

5 THE COURT: Wouldn't be the first time I've been
6 accused of that. All right. I think I understand your
7 positions.

8 Let's turn to the next motion. Unless there's anything
9 else you wish to ask on the wave four argument, I'd just as
10 soon turn to the motion for clarification. Mr. Foster?

11 MR. FOSTER: Well --

12 THE COURT: If you have other arguments --

13 MR. FOSTER: -- wave four is just a --

14 THE COURT: Go ahead.

15 MR. FOSTER: Again, this is the next tab. I'm not
16 going to spend a lot of time on this, but the Defendants
17 raised it. Obviously the big issue in wave four is the
18 temporal issue. We had a few things in our first slide or
19 two to indicate that temporality issue should be treated
20 identically for wave four as it is in any other context.
21 But they also raise two other issues. They talk about an
22 Icon IP case, and what we put in our slides here is -- is
23 the Icon IP case is okay. There what happened in those
24 cases all the things were prefiling acts of infringement,
25 and so Icon IP is not at all inconsistent with the position

1 that we're taking here. But it's all in the slides, and I
2 don't need to get into that.

3 Finally, I do want to say something about the
4 collateral attack.

5 THE COURT: Yeah.

6 MR. FOSTER: An attack means, boy, the judge got
7 it wrong. That's not what we're -- that attack is what we
8 take up to the Appellate Court. When we file something with
9 you, it's not an attack, and it's not collateral because
10 you're the judge. But I do point out on the next couple of
11 slides -- and we've shown you these before -- the authority
12 in the Ninth Circuit is that if the party is penalized in
13 the first case, as you penalized us, it would be wrong to
14 throw out the second case for the reasons that's set forth
15 there in the Adams and I think the Addison cases.

16 That's all I have to say on wave four, and now do you
17 want me to move on to the motion for clarification?

18 THE COURT: Well, why don't we hear from the
19 Defendants on wave four, and then we'll keep going down the
20 list. Does anybody wish to speak to wave four?

21 UNIDENTIFIED SPEAKER: I'll start with 10 seconds
22 on behalf of AT and T. I think the issues, your Honor, are
23 identical, as you pointed out, to the motion that Mr. Selwyn
24 addressed, and so for all the reasons that he articulated,
25 we believe that Adaptix's motion should be denied here.

1 THE COURT: Nothing wrong with a succinct
2 argument. Mr. Cruzen, do you have anything?

3 MR. CRUZEN: I'll try and follow suit, your Honor.

4 THE COURT: Okay.

5 MR. CRUZEN: I think one difference about claims
6 pleadings argument that is -- distinguishes it from the Dow
7 case, Brain Life, Aspex Eyewear, Adaptix tried to sue in two
8 simultaneous cases the same products on the same patents. A
9 number of cases dealt with that. You can see they got an
10 adverse ruling on the motion to amend the infringement
11 contentions, then turned around and filed a new suit the
12 next day. If that were permitted, you could have serial
13 suits filed every time somebody got an adverse ruling. We
14 don't think that would serve the interests of judicial
15 efficiency or consistency in jury verdicts because you can
16 imagine you could get conflicting decisions in these
17 simultaneously pending suits. So just one more reason we
18 think --

19 THE COURT: Just on that last point, Mr. Cruzen,
20 because it's something I've been thinking about. I meant it
21 when I said I was eager to hear from you all today because
22 these issues continue to fascinate me. If -- if I
23 understand your point correctly, what you're basically
24 saying is in these situations, if a Plaintiff, for example,
25 brings a motion to amend and the Court dismisses it for lack

1 of diligence let's just say, what you're saying effectively
2 is they're out of luck. They should understand that when
3 they engage in that type of lack of diligence or suffer from
4 -- they are going to pay a price for that, not just in this
5 case but in cases that follow. Is that fair?

6 MR. CRUZEN: I think that's correct, your Honor,
7 and that is what happened in the Icon case. I think maybe
8 there's a different situation where if you're on the eve of
9 trial, a motion to amend is denied for undue prejudice
10 because the defense wouldn't -- that's a different
11 situation, but for diligence I think that just stands for
12 the reason. And one other point I should mention is Adaptix
13 relied upon this legal fiction that they never intended to
14 pursue post-Wave Two filing damages. To say that there are
15 really two distinct periods, they litigated the case for two
16 years seeking damages post filing of the Wave Two complaint.
17 And so if the Court rejects that fact, that little fiction,
18 I think their argument fails for that reason.

19 THE COURT: All right. The last question on this
20 one is I for the life of me can't remember as I sit here, in
21 denying the motion for leave to amend, did I address both
22 prejudice and diligence or diligence alone?

23 MR. CRUZEN: You addressed both, your Honor. I
24 think on the prejudice, your Honor, at least one basis was
25 that some Defendants (indiscernible) were deprived of the

1 opportunity to file an IPR.

2 THE COURT: That's right. That's right. Okay. I
3 think I have it. Thank you.

4 Mr. Foster, any rebuttal or, if you want to, you can
5 turn to --

6 MR. FOSTER: I can't speak for all the decisions.
7 I know at least one you said you don't have to reach the
8 issue of prejudice because you found that we weren't
9 diligent.

10 You know, there was one case where the prejudice was
11 they didn't file an IPR, and we kind of ridiculed that, but
12 okay. That -- you did reach prejudice in that.

13 THE COURT: Okay. Thank you. Shall we turn
14 then -- let's turn to clarification.

15 MR. FOSTER: So these were the wave two cases
16 which, I don't know, maybe your Honor did intend to dismiss
17 them, but if that was your intention, the Federal Circuit
18 would probably benefit by a little more discussion of the
19 reasons, as would the parties.

20 So I briefed what appear to be two issues which I think
21 are unique to the wave two cases. First is whether the
22 Kessler Doctrine -- and your views on the Kessler Doctrine
23 are what they are, and I should have said this before.
24 There are certain things that you decided we are not taking
25 up today. We'll take them up -- we take them up with the

1 Federal Circuit, including your handling of the Kessler
2 ground and the Apple cases, and that's fine. But the second
3 Kessler issue we do take up today it says the Kessler
4 Doctrine once it's invoked as a reply to a competitor's
5 products, and that issue is -- does come to the front when
6 you're talking about Dell and Amazon and these other parties
7 that weren't there.

8 So I looked into the cases. The first problem, let's
9 talk for a minute or two about what Kessler is. So we have
10 this elaborate law of preclusion which has been developed
11 over the years by the lawsuit, blah, blah, blah, claim
12 preclusion, issue preclusion, and it's very ornate and well
13 reasoned. Then there's this Kessler decision that happened
14 a long time ago, and the Federal Circuit has decided to keep
15 it around to give some kind of effect. But the problem with
16 -- with that is -- and, of course, that's your decision, is
17 that in some ways it's inconsistent with the process that's
18 been set up, and so what district courts have to do in the
19 first instance is figure out, well, okay, what do we do with
20 that. And the problem we end up with is a lot of
21 arbitrariness which is difficult to explain in the total
22 scheme of things. So the request for this Court is, "All
23 right. Recognizing there is some arbitrariness, where do we
24 draw these lines?" And we litigants are faced with the same
25 issue. It's kind of hard to come up with a theory because

1 the theory which governs cases generally isn't consistent
2 with what we see in the Kessler case.

3 So the question as to arbitrariness today is, well, you
4 got Kessler. Do you extend it to competitors' products.
5 The best we can do is go back to cases that were decided by
6 the Supreme Court way back then, and this fascinated me.
7 The Goodyear cases, now, Goodyear got a judgment that a
8 patent wasn't valid. This is before Blonder-Tongue
9 (phonetic). So what happened is -- and that went to final
10 final and appeals were exhausted. Then somebody else raised
11 the argument, and the Court there found, well, no, the
12 patent's perfectly valid, and that got upheld.

13 So the way the courts worked it out, they say, well,
14 okay, the patent's value, you can sue on it, but Goodyear
15 has a free pass. They have a -- what's the word, claim -- I
16 forget, trade right. And so the patent owner then tried
17 suing various people, and he sued companies that had bought
18 their materials from Goodyear and then used the materials to
19 make the same product that Goodyear was making.

20 THE COURT: What was the product? I assume we're
21 talking about tires. Was the downstream producer a tire --

22 MR. FOSTER: Something --

23 THE COURT: -- manufacturer? I'm just trying to
24 think --

25 MR. FOSTER: Some kind of tire setup. I know when

1 I was here before I actually got a picture from the
2 patent --

3 THE COURT: Okay. In any event, I --

4 MR. FOSTER: -- of the patent that I showed you.

5 THE COURT: -- I take your point.

6 MR. FOSTER: But -- but, yeah, and the claims were
7 -- the claims involved in these three cases were the
8 manufacturer of the product, and because these people buying
9 the materials and Goodyear was manufacturing it, well, they
10 didn't get the benefit of the trade right. And so we argued
11 in our briefing, well, if they don't and they buy the stuff,
12 why should a competitor of theirs get the trade right.

13 But, as I read and preparing to argue today I went back
14 and read carefully all of the briefing in this case, and I
15 didn't really see anybody arguing that Sony, for instance,
16 gets the trade right. The argument that was being made in
17 these briefs are that the carriers get the trade right
18 because the carriers here, AT and T and Verizon, were
19 victorious before your Honor. So, therefore, they're
20 entitled to trade.

21 Well, then the question, okay, you got to trade, right,
22 at least under your application of Kessler doesn't extend to
23 products that were involved in the first case, products of
24 other manufacturers. I don't have 50 cases in this. I just
25 have Brain Life where the actual entity that won the first

1 case did not get a Kessler right to a product that they were
2 now selling, even though it's similar -- it might be
3 identical -- because they purchased it from somebody else.

4 Well, I don't know how to distinguish that from the
5 Sony products or the Dell products which were not involved.
6 Again, I can't come up with a sophisticated theory because
7 Kessler is just kind of an arbitrary thing which sits in the
8 middle of this. All I can say is we have one case from the
9 Federal Circuit, a case which, frankly, you relied upon in
10 your interpretation of Kessler, and if you're going to rely
11 upon this case, I think you have to go in that direction.
12 So that's the Kessler argument.

13 The other argument with respect to claim preclusion
14 isn't really invoked by this particular motion. So I'll
15 save that for the next motion.

16 THE COURT: Thank you, Mr. Foster.

17 Who wants to respond to this one?

18 MR. PANKRATZ: Your Honor, Kurt Pankratz on behalf
19 of AT and T. And since he addressed just the Kessler issue,
20 I'll do the same.

21 THE COURT: Sure.

22 MR. PANKRATZ: This presents the exact situation
23 here with respect to AT and T, Verizon and Verizon that
24 Kessler is designed to prohibit, which is serial lawsuits
25 accusing the exact same thing of infringement, and there is

1 no dispute here, your Honor, in your order. They don't
2 dispute it. It is identical infringement allegations. It's
3 based on the standard. That's what's accused of
4 infringement.

5 THE COURT: Mr. Pankratz, can I just ask you is it
6 -- if I've erred previously, I apologize, and I want to make
7 sure I don't err in the future. Is it proper for me to
8 characterize or even just understand that AT and T, for
9 example, is a customer of one of the handset manufacturers
10 in the -- in the Kessler sense of that word or is that not
11 accurate?

12 MR. PANKRATZ: I don't think that would be the
13 right way to characterize it because, frankly, Kessler
14 starts with the victorious party, and the victorious party
15 here is AT and T and Verizon.

16 THE COURT: Right.

17 MR. PANKRATZ: And so I don't think it's proper to
18 characterize them as the customers.

19 THE COURT: Because AT and T and Verizon were part
20 of wave one as opposed to --

21 MR. PANKRATZ: Correct.

22 THE COURT: -- in Kessler the party seeking to
23 invoke the benefit of the doctrine was not in the First
24 District Court case, right?

25 MR. PANKRATZ: That's exactly right, your Honor.

1 THE COURT: Okay.

2 MR. PANKRATZ: And that's -- in the -- in the Goodyear
3 cases, he was talking about it was a customer. It was a
4 downstream person who hadn't even purchased the built radial
5 tires. They just purchased some rubber, and then they themselves
6 manufactured what was the infringing product, and the Court in
7 those three very tightly related cases said you don't get a -- you
8 don't downstream get a right just because you bought some rubber
9 from Goodyear. You have to buy the actual built tire. They don't
10 go into --

11 THE COURT: Understood. And, again, it's certainly the
12 case that in those Goodyear cases, the customer that purchased the
13 rubber was not a named defendant in the first case against
14 Goodyear proper, right?

15 MR. PANKRATZ: That's correct.

16 THE COURT: Okay.

17 MR. PANKRATZ: That is correct. So here the Kessler
18 doctrine starts with the victorious Defendant, and that's AT and
19 T. That's Verizon. They have the trade right, and the test, he
20 -- Mr. Foster said that we don't have this built up, established
21 test, but the test for the Kessler doctrine is actually, in my
22 view, borrowed from claim preclusion. It is the same or
23 essentially the same. It looks to is there a material difference
24 between the products with respect to infringement. There's no
25 dispute here. It is the 4G LTE standard that is accused of

1 infringement. AT and T should be able to continue selling 4G LTE
2 compatible devices without fear that there's some arbitrary line
3 between where a new device can be accused based on the exact same
4 infringement allegations that AT and T and Verison --

5 THE COURT: When you say that the accused products here
6 are similar -- are substantially similar in the same way as was
7 the case in Kessler, I think we've talked about this in one
8 earlier hearing or more. I assume what you're saying is
9 similarity as measured by the relevant functionality, and the
10 functionality that gives rise to the infringement allegations?

11 MR. PANKRATZ: Yes. Yes, your Honor.

12 THE COURT: Okay.

13 MR. PANKRATZ: And I believe there is no dispute. The
14 infringement allegations across all the cases are virtually cut
15 and paste identical. There is nothing manufacturer specific in a
16 single one of those except maybe a footnote here or there.

17 THE COURT: Right.

18 MR. PANKRATZ: They are identical allegations.

19 THE COURT: I'm not suggesting this is the case here,
20 but, for example, if the phones in the later wave were flip phones
21 and the phones in the earlier wave were smartphones, but they all
22 were LTE 4G standard compatible phones, that other characteristic
23 would not be part of the assessment or measure of similarity for
24 purposes of Kessler, right?

25 MR. PANKRATZ: In this case, that's correct.

1 THE COURT: Okay. Understood.

2 MR. PANKRATZ: Certainly if the patents involved how
3 you picked up and answered the phones --

4 THE COURT: Right.

5 MR. PANKRATZ: -- there may be a different analysis.

6 THE COURT: Okay. All right. I think I have it, Mr.
7 Pankratz. Thank you.

8 MR. PANKRATZ: Thank you.

9 THE COURT: Mr. Foster, anything else on this one?

10 MR. FOSTER: I don't think so, your Honor. The
11 questions you were asking my colleagues about were not arguments
12 we were relying upon, although I know the cases that they were
13 talking about. Again, I didn't hear them say anything about Brain
14 Life. So I have nothing to respond to.

15 THE COURT: All right. Thank you, Mr. Foster.

16 MR. PANKRATZ: I will --

17 THE COURT: Sure. You've been waiting all afternoon.
18 I want to give each of you the opportunity.

19 MR. PANKRATZ: Very briefly. He did raise the issue of
20 the -- I believe it was the ERGO Plus Plus product. He didn't
21 name it specifically, but after the first case in Brain Life,
22 there were a number of additional products that the accused
23 Defendant was selling. It included a number of follow-on devices,
24 and then it also included this ERGO Plus Plus, which was
25 apparently they bought a company and brought that product in.

1 There's not a lot of discussion on this, but basically the Federal
2 Circuit says that there were no infringement allegations ever
3 against this product and we need to send it back down to the
4 District Court for more -- for more factual gathering.

5 THE COURT: I don't suppose you know what the District
6 Court did with that. That's Judge Hamilton's case, right?

7 MR. PANKRATZ: I believe so, but I don't know, your
8 Honor.

9 THE COURT: I don't know either. I was just curious.

10 MR. PANKRATZ: I mean, I'm now going to go back and
11 look, but the -- because the ERGO Plus Plus was never addressed,
12 it was sent back. The test here, if you apply the same or
13 essentially the same here, there is no factual dispute. They have
14 agreed. The accusations are on the 4G LTE standard. There is no
15 manufacturer specific issue here.

16 THE COURT: Does anybody know is Brain Life a Northern
17 District Case? Did I manage to stump you all at 5:05? It's not
18 material. So I don't want you to spend any more time on it than
19 necessary, but if while we're debating this anyone could refresh
20 my memory, I would appreciate it. I know it's either Northern or
21 Southern District of California.

22 Mr. Godfrey? Judge Bencivengo's case?

23 MR. GODFREY: Yes.

24 THE COURT: This is how I tend to keep these cases
25 straight. I think I have it, Mr. Pankratz.

1 MR. PANKRATZ: That's all I have. Thank you.

2 THE COURT: Thank you.

3 MR. FOSTER: Do I get my rebuttal now, your Honor?

4 THE COURT: You do. Now that you've heard the
5 argument, Mr. Foster, you do get a rebuttal.

6 MR. FOSTER: Brain Life, Cathy N. Bencivengo, Southern
7 District of California.

8 So what I want to say about Brain, like I say, like in law
9 school there are some cases *sui generis*. Everybody argues about
10 which way you go on that. This is an arbitrary hearing. What
11 happens in Brain Life, the language is the -- the Court talks
12 about how the -- you know, not that the product's different but
13 that they acquired it from somebody else. So it wasn't the
14 subject of the earlier claims. And this was the victorious entity
15 where there's some -- I recognize that even for a party that has a
16 trade right, if they come out with a different product, then
17 they're okay. But that wasn't the basis. It was because it was
18 not -- not the subject of the earlier case. And I have to remind
19 the Court that the Sony products, the Dell products were also not
20 the subject of the other case. They may, in fact, be similar. If
21 this were an issue preclusion case, that would be waived, but I
22 think the Brain Life court also allowed that the products might be
23 quite similar as well.

24

25 THE COURT: All right. Thank you, Mr. Foster.

1 Unless there's anything else on this one, why don't we turn
2 to the next motion which I believe is AT and T, Verizon, and HTC's
3 motion for judgment on the pleadings.

4 Mr. Williams, good evening.

5 MR. WILLIAMS: Good evening, your Honor. At the risk
6 of hearing I'm going to be brief, real brief. I think --

7 THE COURT: Take whatever time you need. Go ahead.

8 MR. WILLIAMS: Thank you, your Honor. I think this
9 motion rises or falls with what the Court decides on the Rule 52,
10 59 motion. There's not a whole lot more to add on this one.

11 THE COURT: Do you see any daylight at all between the
12 issue in this case and the issue that Mr. Selwyn argued?

13 MR. WILLIAMS: That we just talked about? Oh, that Mr.
14 Selwyn talked about?

15 THE COURT: Yeah. I tend to agree with you that I -- I
16 certainly could not identify any way to rule one way in their case
17 and another way in yours, but I want to make sure.

18 MR. WILLIAMS: All of the phones that were at issue in
19 the wave three cases against HTC, involving HTC phones are also
20 accused in this -- in these cases, the wave two cases. There's
21 perfect overlap of phones. It's the same parties. As -- as Mr.
22 Foster admits in his opposition, unless the Court changes its mind
23 on Kessler, these cases should be dismissed.

24 THE COURT: Thank you. Appreciate it, Mr. Williams.

25 Mr. Foster?

1 MR. FOSTER: We've said it in our papers, your Honor.
2 We see this just like the wave three case, and we expect you'll
3 treat it just as the wave three case, but since we had made a
4 motion in the other cases directed towards one of the issues, we
5 point that out.

6 THE COURT: Thank you for that. All right. Unless
7 there's anything else, let's turn to Verizon's motion.

8 Mr. Godfrey, good evening.

9 MR. GODFREY: Good evening, your Honor. Verizon's
10 motion for judgment seeks dismissal of Adaptix's claims against
11 Verizon in the wave two Dell and Kyocera cases, and there are
12 three grounds for dismissal. One is claim preclusion based on the
13 judgment in wave one. Second is Kessler protection based on the
14 judgment in wave one, and the third is issue preclusion in light
15 of the judgments in wave three and four.

16 So I'll start with issue preclusion because that is the
17 doctrine that the Eastern District of Texas applied in granting
18 Verizon's motion in cases that involved LG and Pantech devices.

19 THE COURT: These are Judge Schrader's cases, correct?

20 MR. GODFREY: Correct, your Honor.

21 THE COURT: Okay.

22 MR. GODFREY: So this Court's August order in the wave
23 three and four cases, as we understand it, determined that claim
24 preclusion and the Kessler doctrine bar Adaptix's claims against
25 Verizon both in cases involving Apple and HTC devices and in cases

1 involving devices manufactured by another entity, Dell. There was
2 a Verizon wave four case involving Dell devices. And,
3 specifically, page 22 of the August order includes that the wave
4 three cases involving Apple and HTC must be dismissed on their
5 claim preclusion in Kessler, and then as we understand it,
6 footnote 105 on that page extends that claim preclusion and
7 Kessler ruling to the claims against Verizon in the wave four Dell
8 case. And immediately following that order, your Honor entered
9 judgment in not only the Apple and HTC cases but also the wave
10 four Dell case.

11 THE COURT: I certainly don't recall and certainly
12 don't see anywhere else in the opinion I issued any findings or
13 rulings that would allow me to enter judgment in the -- against
14 Adaptix in the Verizon case, and that would certainly suggest that
15 the footnote was critical and the only analysis I provide, right?

16 MR. GODFREY: That was the reference we saw, your
17 Honor.

18 THE COURT: Okay.

19 MR. GODFREY: So, as a result of that ruling and
20 judgment, issue preclusion now bars Adaptix from relitigating
21 claim preclusion and the Kessler doctrine for the claims against
22 Verizon.

23 THE COURT: And just to be precise, so the issue which
24 gives rise to preclusion is now the decision of the Court on
25 Kessler, et al in the earlier opinion, right?

1 MR. GODFREY: As applied to Adaptix's claims against
2 Verizon.

3 THE COURT: Understood. Okay.

4 MR. GODFREY: Yes, your Honor.

5 THE COURT: Now this is meta in the highest order.

6 MR. GODFREY: Meta preclusion, your Honor.

7 THE COURT: Yeah. Okay.

8 MR. GODFREY: And so Verizon made this identical issue
9 preclusion argument in the Texas cases involving LG and Pantech
10 devices, and Judge Schrader granted the motion and entered final
11 judgment, and Adaptix's appeal in those cases was docketed with
12 the Federal Circuit earlier this month. And in his decision,
13 Judge Schrader expressly rejected Adaptix's argument that the
14 issue would not be identical because the manufacturer of the
15 devices in that case, Pantech and LG, was different from the
16 manufacturer in wave three here, Apple and HTC.

17 THE COURT: Did Judge Schrader rely upon any other
18 grounds in dismissing those claims or was the issue preclusion,
19 meta preclusion argument the only one that he had to grapple with
20 or chose to grapple with anyway?

21 MR. GODFREY: That was certainly the primary argument,
22 your Honor.

23 THE COURT: Yeah.

24 MR. GODFREY: And so issue preclusion alone warrants
25 dismissal of Adaptix's claims in the Kyocera and Dell cases here.

1 The second ground I mentioned, if you were to go past issue
2 preclusion and reconsider the merits of claim preclusion as we've
3 argued before, it's the same parties, Adaptix and Verizon. It's
4 the same patent. There's a final judgment, and the accused
5 devices are essentially the same because the allegedly infringing
6 functionality is set within the standard.

7 THE COURT: I'm sorry for bouncing around, Mr. Godfrey,
8 but going back to Judge Schrader's decision, am I right in
9 understanding that Verizon as well as AT and T benefitted from
10 Judge Schrader's ruling?

11 MR. GODFREY: That's correct, your Honor.

12 THE COURT: Okay. Got it. Okay. Got it.

13 MR. GODFREY: So Adaptix proposes alternative tests for
14 claim preclusion. One of them is whether there can be claim
15 preclusion, but Adaptix proposes there can be no claim preclusion
16 unless it's split its claim against Verizon. As we argue in our
17 briefing, Adaptix did split its claim against Verizon and did so
18 voluntarily. Adaptix could have filed a single case against
19 Verizon and named as accused devices all of the LTE devices that
20 Verizon sells or uses. Adaptix has taken that approach in later
21 cases involving related patents. Here it chose not to do so. It
22 chose to divide its claim against Verizon across multiple suits.

23 So even if your Honor were to apply that framework, there
24 was the splitting of the claim, and it would be claim preclusion
25 here.

1 The second argument Adaptix raises in its brief is that
2 there can be no claim preclusion because, in its view, Verizon
3 acquiesced to the multiple suits, and there's a reference to the
4 Restatement Second of Judgment and other cases in its brief. The
5 only Ninth Circuit case that Adaptix cites, Clements v. Airport
6 Authority of Washoe County, concerned very different facts than
7 what we have here. So there the Defendants did not raise -- they
8 do not object to the multiple suits at all during the District
9 Court proceeding. They didn't raise the issue in their appellate
10 briefing.

11 THE COURT: So it was a waiver?

12 MR. GODFREY: Yeah. And so three months after the
13 appeal oral argument, they filed supplemental briefing raising for
14 the first time this argument of claim preclusion and the Ninth
15 Circuit in that context that there had been a waiver. That's very
16 different from what we have here, and in the opinion the Ninth
17 Circuit notes specifically that the Defendants during the District
18 Court proceedings never objected and, as an example, they give a
19 Rule 12 motion, a motion to dismiss. Well, that's exactly what we
20 have here. We're bringing a Rule 12 motion to bring this issue,
21 and we filed that motion before the close of fact discovery. So
22 it's a very different case here.

23 THE COURT: Not to invade your work product or your
24 mental impressions, Mr. Godfrey, but I'm always looking to learn
25 here. It occurred to me when I saw your motion you very carefully

1 and specifically chose Rule 12(c) as the vehicle upon which to
2 bring the issue to the Court's attention. Was there a specific
3 reason why you brought this as a 12(c) as opposed to a 12(b) (6)
4 that you can share?

5 MR. GODFREY: These cases are further along and that
6 Verizon has --

7 THE COURT: I take it that an answer had already been
8 filed at that point.

9 MR. GODFREY: That's correct, your Honor.

10 THE COURT: So as a matter of timing you were probably
11 not in a position to bring a 12(b) (6), is that --

12 MR. GODFREY: The timing was different. We were
13 farther along but still before the close of fact discovery.

14 THE COURT: I thought I'd ask. Okay. Anything else
15 you need to tell me about this?

16 MR. GODFREY: Just something to add on the Brain Life
17 decision. I think Mr. Pankratz addressed the main point, but I
18 did want to note that the Federal Circuit's opinion -- and this is
19 going to the Kessler issue. The Federal Circuit's opinion did not
20 make a determination of whether the ERGO Plus Plus product was
21 essentially the same as the products in the earlier cases.

22 THE COURT: They sent it back to the Southern District?

23 MR. GODFREY: I think that could be important. They
24 just -- they don't make a determination, and it wouldn't be the
25 Federal Circuit's role in the first instance to make such a

1 determination on appeal.

2 THE COURT: Okay. I think I have it, Mr. Godfrey.

3 Thank you.

4 Mr. Foster?

5 MR. FOSTER: Since he returned to Brain Life, let me
6 read what the Federal Circuit said about the ERGO product:

7 "While similarities between it and the
8 products actually litigated may mean that
9 certain questions regarding infringement of
10 the system claims effectively may be
11 foregoing conclusions."

12 You can read the case and interpret it, but it seems to me
13 they're saying it doesn't really matter. It wasn't involved.

14 All right. Again, I'm going to take my argument out of
15 order because of what my colleague said. On the last slide in the
16 next section, which is the Clements v. Airport Authority, I'm
17 going to call your Honor's attention to the last paragraph which
18 talks about:

19 "Allowing the Defendants to assert
20 claim preclusion at this late stage would
21 work a substantial injustice on Plaintiffs.

22 If the Defendants had asserted their defense
23 earlier, either by formally objecting to the
24 dual proceedings through a motion to dismiss
25 or by asserting a defense in their

1 responsive pleadings, Plaintiff would have
2 had timely notice of the Defendant's claim
3 and would have been able to take appropriate
4 action."

5 It was incumbent upon them to raise this issue during the
6 Apple, HTC case when there were dual proceedings. let me back up
7 a step.

8 THE COURT: So in wave one is what you're saying?

9 MR. FOSTER: Excuse me?

10 THE COURT: You're saying during wave one they should
11 have raised this issue?

12 MR. FOSTER: Yeah. Well, let me put it in context.

13 THE COURT: Go ahead.

14 MR. FOSTER: Because there's a story to be told here.
15 So you start with the AIA, which says you cannot sue two handset
16 manufacturers in one case. Everybody agrees with that. So
17 Adaptix made the decision to sue in pairs a carrier and a handset
18 manufacturer, same claim. It seemed like a good idea. It's an
19 academic question whether that causes claim preclusion or not, but
20 we'll get to that in a minute. Nobody thought of that at the time
21 on either side of the versus. And that's why I'm talking about
22 this here. If they had a problem with "Wait a minute. You sued
23 us -- Apple -- you sued up in the Apple," as soon as they see --
24 if they bring it up at the time, we come in and we say "What are
25 we going to do about this," and it may well be the solution that

1 would have been all right, we'll have three -- four suits, one
2 against just AT and T for all and one against just Verizon, same
3 for Apple. That would be worked out, and that's what the Court in
4 the Ninth Circuit is talking about in this last paragraph. If you
5 raise the motion during the duality, then the courts get a chance
6 to work that out, but if you sit on your hands and wait until one
7 case is dismissed and say -- and pop up and say "Ah ha, claim
8 preclusion," you get the kinds of inequities that the Ninth
9 Circuit is talking about in Clements, and it's not just Clements.
10 Clements adopted the position in the Restatement Second Judgment
11 26 which we cited in the first paragraph, and that is on the
12 previous slide which talked -- and we've been through this before,
13 talked about why that is.

14 All right. Let me get back to my regular organization,
15 which let's start with claim preclusion, different Defendant
16 issue. This is so simple. These cases involve the use of Sony
17 Amazon, Dell, Kyocera. The final judgment was in Apple and HTC.
18 We don't see it as the same claim, certainly at the handset level,
19 but we allowed -- and they didn't make that argument in their
20 initial papers, but we allow them, okay, you -- you could have
21 made the argument and then you have the acquiescence problem, but
22 going back to my second slide, let's suppose we had a patent which
23 had something to do with an automobile part. So we sue Ford and
24 we win. Great. So we sue General Motors. The lawyers come in
25 and say "Wait a minute. Claim preclusion. Our products in this

1 respect are identical to yours, to Ford's." And, in fact, those
2 are the cases they've been cited. That's their argument, "Our
3 products are like those of Apple and HTC." But, no, it's --

4 THE COURT: Aren't the parties different in your
5 hypothetical as opposed to --

6 MR. FOSTER: Excuse me?

7 THE COURT: Aren't your parties different in your
8 hypothetical as opposed to just the products? You --

9 MR. FOSTER: Yeah, well, that's the point I'm trying to
10 make.

11 THE COURT: Okay.

12 MR. FOSTER: And in this paragraph, claim preclusion
13 requires both the same Defendant and similar products. The
14 similar products test is only invoked if it's the same Defendant.
15 So if you sue Ford in the first case and then Ford in the second
16 case, the issue is "Wait a minute, the -- are they the same," but
17 if you sue General Motors in the second case, you never get to the
18 -- it's, hey, this is General Motors. You're not bringing a Ford
19 claim.

20 THE COURT: Right.

21 MR. FOSTER: And I keep saying this in our briefs, and
22 they keep saying that we're ignoring the test for claim
23 preclusion, which is where the products are the same. Well, no,
24 it's not the test when it's different products. And, as I say,
25 here these claims are for the use of Sony products on the network,

1 not the claims of Apple and HTC products.

2 Well, we've covered those in our briefs. Like I said,
3 they could have made an argument which we outlined for them in our
4 response, and they picked up on the reply, and we said that
5 argument wouldn't apply because of the acquiescence issue. So,
6 again, I've argued this before. I'm not going to spend any more
7 time on it today.

8 THE COURT: Thank you, Mr. Foster.

9 MR. FOSTER: Oh, one issue. Don't rush out here. The
10 Texas decision, this is where they have commented. So Judge
11 Schrader gets these preclusion motions. He reads your opinion
12 August 21 and says, "Well, based upon what I think Judge Grewal
13 did, I am bound and I got to do this." Okay. All right. So we
14 have filed motions asking you either to clarify or to reach a
15 different decision, which you may reject, but if you grant any of
16 them -- if you reject them, then fine, but if you grant any of
17 them, then the question is, "Well, what do we do about Judge
18 Schrader," and I think I mentioned this when I was here last time.
19 My assuming that it's appropriate, I think the course for us to
20 do, because we've already filed a notice of appeal. He doesn't
21 have jurisdiction, but I understand the practice in the Fifth
22 Circuit is then you go to the judge and say "Judge, look what
23 Judge Grewal did. If you had known that, if this had happened
24 before you made a decision, would this have changed your
25 decision?" Then -- and then the practice there is the judge --

1 assuming the answer is yes, then he issues -- say, "Well, yes,
2 this has happened," and then the parties then take that to the
3 Appellate Court and they send the case back.

4 So I just wanted to outline that's the procedure. Yes,
5 Judge Schrader did decide what he did. He was acting on what he
6 thought your reasoning was, and if you change in any respect, that
7 may affect what Judge Schrader does.

8 THE COURT: All right. Thank you, Mr. Foster.

9 Mr. Godfrey, any rebuttal to that? I take it you would
10 agree whatever Judge Schrader may or may not do with any of my
11 opinions is, of course, Judge Schrader's responsibility, right?

12 MR. GODFREY: Yes, your Honor.

13 THE COURT: Okay. Go ahead.

14 MR. GODFREY: Just to address the Ford, General Motors
15 hypothetical, I think your Honor's observation that that would be
16 different parties is an important one. I think the -- that's not
17 what's going on here where we have a lawsuit against one defendant
18 and a lawsuit against a different defendant and that different
19 defendant who is a non-party is seeking to argue claim preclusion.

20 What we have with respect to Verizon's motion, for example,
21 is Verizon, who is a party to the first case and the second case,
22 arguing claim preclusion. So that would be like if the Plaintiff
23 sued Ford or some industry standardized component, a spark plug or
24 something, brought the first suit and accused the Ford Tempo, lost
25 and then filed another lawsuit accusing the Ford Taurus, Ford

1 Fiesta and so on, that's closer to what's going on here. That's
2 where claim preclusion would apply.

3 Thank you, your Honor.

4 THE COURT: All right. Thank you.

5 All right. Unless I have overlooked a motion, I believe we
6 have covered those motions which are to be argued this evening.

7 Mr. Clonts, I didn't give you a chance to say anything.
8 Would you like to add anything to your colleague's comments?

9 MR. CLONTS: No, your Honor. Thank you very much.

10 THE COURT: All right. Is there anything else I can
11 help you with this evening, gentlemen?

12 MR. PANKRATZ: I'll take five seconds of your time to
13 answer your curiosity question from earlier.

14 THE COURT: Sure.

15 MR. PANKRATZ: The Brain Life case has been dismissed
16 on stipulation of the parties. So --

17 THE COURT: Yeah. I believe Judge Bencivengo mentioned
18 they settled after the remand if I'm not mistaken. Okay. All
19 right. Anything else? Thank you for that clarification.

20 How's everything else working out otherwise? Are there any
21 other brewing issues I can help you with now that might save us
22 some letter briefing?

23 MR. FOSTER: Just let you know, your Honor, that after
24 I leave this courtroom, I'm going up to meet with ZTE and Judge
25 Cousins.

1 THE COURT: Okay. All right. Well, I won't keep you
2 from that important work. Have a wonderful evening. Thank you
3 again for your patience.

4 ALL: Thank you, your Honor.

5 THE CLERK: Operator, that concludes our calendar.

6 THE COURT: Thank you, Operator.

7 OPERATOR: Thank you, your Honor.

8 (Proceedings adjourned at 5:25 p.m.)

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23 I certify that the foregoing is a true and correct
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10 nor employed by any of the parties to the action in which this
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12 otherwise interested in the outcome of the action.

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Wednesday, December 2, 2015

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